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Nos. 04-1528 & 04-1530

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IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM SORRELL, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF CURRENT AND FORMER STATE COURT JUSTICES AND JUDGES IN SUPPORT OF RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND RESPONDENTS-INTERVENORS-CONDITIONAL CROSS PETITIONERS

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With the consent of the parties, *Amici Curiae* hereby submit their brief in support of the Respondents-Conditional Cross Petitioners in these cases and Respondents-Intervenors-Conditional Cross Petitioners.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici Curiae are current and former state court justices and judges, who are deeply concerned about the growing influence of special interest money on judicial campaigns.[2] Most of the *Amici* have personal experience as candidates in judicial elections, and all of them deplore the disturbing trends described in this brief. *Amici* do not necessarily support spending limits in any particular campaigns for the bench, but they believe that states should have the option to

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[1] Letters of consent from counsel for all parties have been filed with the Clerk of this Court. No party's counsel authored any part of this brief. No person or entity other than *Amici* and their counsel contributed monetarily to preparing or submitting the brief.

[2] *Amici curiae* are former Chief Justices of state high courts: Hon. James G. Exum, Jr. (North Carolina Supreme Court, 1986-1994), Hon. Richard P. Guy (Washington Supreme Court, 1999-2001), Hon. William C. Hastings (Nebraska Supreme Court, 1987-1995), Hon. Conrad L. Mallett, Jr. (Michigan Supreme Court, 1997-1998), Hon. Vincent L. McKusick (Maine Supreme Judicial Court 1977-1992), Hon. Robert A. Miller (South Dakota Supreme Court, 1990-2001), Hon. Robert Utter (Washington Supreme Court, 1979-1981); former and current Associate Justices and Associate Judges of state high courts: Hon. Andy Douglas (Ohio Supreme Court, 1985-2002), Hon. Robert H. Dudley (Arkansas Supreme Court, 1981-1996), Hon. Stewart F. Hancock, Jr. (New York Court of Appeals, 1986-1993), Hon. Howard A. Levine (New York Court of Appeals, 1993-2002), Hon. David Newbern (Arkansas Supreme Court, 1985-1998), Hon. Alice Resnick (Ohio Supreme Court, 1989-present), Hon. Cruz Reynoso (California Supreme Court, 1982-1987); and former and current Justices and Judges of intermediate appellate and trial courts: Hon. Murry Cohen (Court of Appeals for the First District of Texas, 1983-2002), Hon. Donald J. Horowitz (Superior Court of Washington for King County, 1973-1977), Hon. James Wynn (North Carolina Court of Appeals, 1990-present).

consider such limits as a narrowly tailored response to imminent threats to the real and perceived impartiality and independence of the judiciary. *Amici* recognize that the instant case does not pertain directly to campaigns for the bench. But the petitioners in the instant case maintain that *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), is an absolute bar to mandatory spending limits, even in judicial elections. *Amici* therefore urge this Court to grant both their petitions (as to Question 1 in each) and the conditional cross petitions to resolve whether that interpretation is correct and, if it is, to reconsider *Buckley*.

Most of the *Amici* on this brief previously asked this Court to review the same issue in *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir.), *cert. denied*, 125 S. Ct. 625 (2004). They are now joined by additional former and current state judges and justices, who wish to renew that request with new campaign fundraising and interest group spending data from the 2004 state Supreme Court elections. The escalation in 2004 of the troubling trends described in their *amicus* brief last year brings new urgency to this request for consideration of the petitions (as to Question 1) and the conditional cross petitions in these cases.

SUMMARY OF ARGUMENT

The constitutionality of spending limits in judicial elections has never been considered by this Court. When *Buckley* was decided, campaigns for the bench were inexpensive, uncontentious, and largely unnoticed. There was no call for expenditure ceilings under the circumstances of those campaigns, and there was no reason for the *Buckley* Court to decide whether such caps could survive constitutional scrutiny.

But judicial elections have changed dramatically since the 1970s. Several states have seen million-dollar campaigns

for their Supreme Courts, and an arms-race mentality is growing, as candidates build ever-larger war chests in the search for electoral success. Without spending limits to reduce the demand for private contributions, candidates increasingly must solicit funds from wealthy special interests on either side of the issues likely to come before the court. The highly visible infusions of unlimited special interest money into the coffers of judicial candidates leaves the public wondering whether justice is for sale.

To date, courts reviewing the constitutionality of spending limits in judicial elections have not been willing to consider the changed circumstances of modern campaigns for the bench, which were not and could not be considered in *Buckley*. Their refusal is grounded on the same premise endorsed by petitioners in these cases—that *Buckley* represents an absolute bar to spending limits no matter what the circumstances. With traditional standards for judicial elections rapidly eroding—and, with them, public confidence in the courts—the petitions (as to Question 1) and the conditional cross petitions should be granted in these cases to clarify whether that interpretation is correct and, if so, to reconsider *Buckley*. See Point I.

The petitions (as to Question 1) and the conditional cross petitions should also be granted to resolve whether interests not considered in *Buckley* might justify spending limits in judicial elections. At least three distinct interests—in the impartiality of the judiciary, in its independence, and in the appearance of impartiality and independence—are potentially compelling enough to support such limits. At this critical juncture, when all three interests are in serious jeopardy, this Court should take the opportunity to consider whether *Buckley* permits consideration of new rationales for spending limits, and if it does not, to reconsider *Buckley*. See Point II.

ARGUMENT

I. The Changes in Judicial Campaigns Since the Decision in *Buckley* Are Grounds for Reconsideration of the Circumstances Under Which Spending Limits Might Be Constitutional.

In recent years, studies have documented the increasing demand for large sums of money to support candidacies for the bench in states with elective judiciaries. Because the contributions come principally from parties and attorneys who appear in court, the public concludes that the contributors are meant to influence, and do influence, decision-making on the bench. Because these developments post-dated the decision in *Buckley*, and because Congress did not presume to regulate state judicial elections in the Federal Election Campaign Act, the *Buckley* Court did not consider the constitutionality of spending limits in campaigns for the bench. This Court should grant the petitions (as to Question 1) and the conditional cross petitions for writs of certiorari in these cases to clarify whether *Buckley* bars such limits in all elections and, if it does, to reconsider *Buckley*.

A. Judicial Campaigns Have Materially Changed for the Worse Since *Buckley*.

It is no secret that "campaigning for a judicial post today can require substantial funds." *Republican Party of Minnesota v. White*, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring). Fundraising by state Supreme Court candidates jumped from $28,291,950 in 1998 to $45,636,059 in 2000, an increase of 61 percent in just one election cycle. Deborah Goldberg *et al.*, *The New Politics of Judicial Elections* 7 (Justice at Stake 2002), *at* http://www.justiceatstake.org/files/JASMoneyReport.pdf [hereinafter *New Politics 2000*]. "That increase was no 'sport,' but a new peak in a clear, dramatic

trend whether viewed in terms of total dollars, or dollars-per-seat, or percentages." Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. Rev. Mich. St. U.-Detroit C.L. 849, 862. In 2002, the four general election candidates for two Ohio Supreme Court seats raised a total of $6,241,583, and none raised less than $1,193,732. Deborah Goldberg & Samantha Sanchez, *The New Politics of Judicial Elections 2002* 15 (Justice at Stake 2004), *at* http://faircourts.org/files/NewPoliticsReport2002.pdf [hereinafter *New Politics 2002*].

The 2004 state Supreme Court elections continued this trend. For the third straight election cycle, more than 10 candidates raised as much as $1 million in pursuit of a seat on the bench. Deborah Goldberg *et al.*, *The New Politics of Judicial Elections 2004*, 14-15 & Fig. 10 (forthcoming Justice at Stake 2005), *available as of July 2005 at* http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf [hereinafter *New Politics 2004*]. In just one cycle, the cost of winning jumped 40 percent. *Id.* at 13-14. And nine out of 22 states with contested races broke aggregate fundraising records. *Id.* at 13.

The high and unquestionably growing demand for funds is in part the result of changes in the way campaigns are run. In 2000, Supreme Court candidates ran television ad campaigns in only four states. *New Politics 2000*, at 13. Two years later, the number of states seeing television commercials financed by Supreme Court candidates rose by 75 percent. *New Politics 2002*, at 8. This past year, candidates for their state's highest court bought television airtime in 16 states, quadrupling the number of states in just four years. *New Politics 2004*, at 3. The high cost of airtime forces judicial candidates to raise large sums from parties interested in influencing judicial decision-making. *See* Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30